United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

483

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,328

SANDOZ, INC.
and
MAURICE LESSIN,
Appellants

v.

EVELYN G. KAPLAN,
Appellee

Appeal From the United States District Court
for the District of Columbia

APPENDIX

ARTHUR L. WILLCHER
1511 K Street, N.W.
Washington D.C.
Attorney for Appellants

Washington, D.C. THIEL PRESS 202 393-0625

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CIVIL DOCKET

United States District Court for the District of Columbia

PARTIES	ATTORNEYS	NUMBER
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a corporation	Frederick DeJoseph	ACTION FOR
	4750 Wisconsin Ave., N.W.	DAMAGES - BREACH OF CONTRACT
MAURICE LESSIN		$15,000.00
		TAXED COSTS
v.		Atty.
EVELYN G. KAPLAN	Joseph L. Rauh, Jr.	Marshal
	John Silard	Clerk
	1625 K St NW	Witnesses
		Depositions
		Examiner
	Jury demand [X]	Ct. Appeals
	Report Judgt. [ ]	TOTAL

DATE	ACCOUNT	REC'D	DISB'D	DATE	ACCOUNT	REC'D	DISB'D
1964							
Mar. 6	Willcher	10 00					
Mar. 6	U. S. Treas.		10 00				
1969							
June 27	Willcher	5 00					
June 27	U.S. Treas.		5 00				

CIVIL DOCKET

United States District Court for the District of Columbia

DATE		PROCEEDINGS	
1964		Deposit for cost by	
Mar.	6	Complaint, appearance, jury demand filed	1
Mar.	6	Summons copies (1) and copies (1) of Complaint issued Ser 3/19/64 (Real Est.Com)	2
Apr	10	Answer of deft to complaint; c/m 4/8/64; appearance of Joseph L. Rauh, Jr. and John Silard. filed	3
Apr	10	Calendared (AC/N) (N)	
Apr	10	Notice by deft to take deposition of Maurice Lessin and Robert D. Tedrow, Jr. filed	4
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Apr	15	Notice by deft to take deposition of pltf and Robert D. Tedrow, Jr. filed	6
Apr	27	Motion of pltffs. to quash taking of deposition withdrawn per atty. for pltffs. filed	7
May	21	Depositions of Maurice Lessin and Robert D. Tedrow,Jr., 5/7/64. filed	8
Oct	21	Motion of defendant for issuance of subpoena for production of documents on deposition, c/m 10-21-64 MC 10-21-64 filed	9
Oct	21	Called Pretrial Examiner	
Oct	21	Notice by defendant to take oral depositions of plaintiff, Robert D. Tedrow, Jr. and Mrs. Evelyn Nolan, c/m 10-21-64. filed	10
Nov	6	Order denying motion for order directing issuance of subpoenas. (N) Tamm, J.	11
Dec	21	Deposition of Robert D. Tedrow, Jr. published. filed	12
1965			
Mar.	22	First notice under Rule 13	
Apr.	26	Cause dismissed, as of 4-22-65. (AC/N) (N) (By Clerk)	13

1969			
Apr.	7	Motion of pltffs. to vacate order of dismissal and to enter action on trial calendar. c/m 4/7/69. M.C. filed	14
Apr.	15	Opposition of deft. to motion to vacate order of dismissal; P&A Exhibits 2,3, & 1; c/m 4/15/69. filed	15
May	20	Affidavit of Arthur L. Willcher. filed	16
May	20	Motion to vacate order of dismissal and to enter action on trial calendar, argued and takend under advisement; court allows deft. one week within which to file reply to plaintiff's affidavit of May 20, 1969. (Reporter; Eva Marie Sanche) Corcoran, J.	
May	23	Supplemental Memorandum by deft.; Affidavit; c/m 5-23-69. filed	17
May	29	Order denying motion to vacate order of dismissal and to enter action on trial calendar. (N) Corcoran, J.	18
June	27	Notice of appeal by Pltf from order of 5/29/69; copy mailed to J. L. Raun. Deposit $5.00 by Willcher. filed.	19

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Sandoz, Inc.,
a corporation
1536 Connecticut Avenue N. W.
Washington, D. C.

and

Maurice Lessin,
8719 Colesville Road
Silver Spring, Maryland

Plaintiffs

vs

Evelyn G. Kaplan
10315 Kensington Parkway
Kensington, Maryland
Serve: Care of D. C. Real Estate Comm.

Defendant

Civil Action No. 564-64

FILED
MAR 6 1964
HARRY M. HULL, Clerk

COMPLAINT
(Damages-Breach of Contract)

1. This is an action to recover a judgment in the sum of $15,000.00 and is within the jurisdiction of this court.

2. Plaintiff's and defendant are licensed real estate brokers in the District of Columbia and have been at all times set forth herein.

3. During the latter part of 1960 and the early part of 1961 the plaintiff Lessin had listed with him for sale as a real estate broker the property known as The Highlands Apartments located on Connecticut Avenue and known as 1914 Connecticut Avenue N. W. in the District of Columbia. The plaintiff Sandoz, Inc., a corporation then requested of the plaintiff Lessin a cooperating listing for the sale of such property and the price therof being approximately $1,500,000.00. Lessin then gave such listing to the plaintiff Sandoz.

4. During that same year of 1961 the defendant Evelyn G. Kaplan obtained from the plaintiff's a further cooperating listing for the sale of the Highlands on the basis that two thirds of any commission earned would be paid to the plaintiffs and one third kept by the defendant. The defendant did thereafter attempt to sell such property and did eventually sell such property for a price which plaintiffs are informed and believe and therefore allege to be approximately $1,445,000.00. Plaintiffs further allege that the defendant received as a commission for such sale the sum of approximately $22,500.00.

5. Plaintiffs made demand upon the defendant for their share of the commission in the sum of $15,000.00 which the defendant failed and refused to pay and still fails and refuses to pay. There is justly due and owing to the plaintiffs by the defendant the sum of $15,000.00 besides costs.

Wherefore plaintiffs demand judgment against the defendant in the sum of $15,000.00 besides costs.

Arthur L. Willcher
1026 Investment Building
Washington 5, D. C.

Frederick DeJoseph
4750 Wisconsin Avenue N. W.
Washington, D. C.
Attorneys for Plaintiffs

Plaintiffs demand a trial by jury.

Arthur L. Willcher

5496

[Caption Omitted in Printing]

ANSWER

Comes now defendant in the above-entitled action and for her answer states as follows:

1. Having no knowledge of the matters set forth in paragraph 3 of the Complaint, defendant denies the same and demands strict proof thereof.

2. Defendant denies the allegations of paragraph 4 of the Complaint and demands strict proof thereof.

3. To the extent that paragraph 5 of the Complaint states averments of fact, they are denied.

Joseph L. Rauh, Jr.

John Silard

1625 K Street, N.W.
Washington 6, D. C.

Attorneys for Defendant

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

NOTICE OF TAKING ORAL DEPOSITIONS

TO: Arthur L. Willcher, Esq.,
1026 Investment Building,
Washington, D. C.,
and
Frederick DeJoseph, Esq.,
4750 Wisconsin Avenue, N.W.,
Washington, D. C.,
Attorneys for Plaintiffs.

Please take notice that the defendant will take the depositions of the plaintiff, Maurice Lessin, and Robert D. Tedrow, Jr., an employee of the plaintiff, Sandoz, Inc., in the offices of Rauh and Silard, 1625 K Street, N.W., Suite 821, Washington, D. C., counsel for defendant, at 10:00 a.m. on Tuesday, April 14, 1964, before Ward & Paul, shorthand reporters, or any other authorized Notary Public in and for the District of Columbia, said examination to be for the purpose of discovery or as evidence in this action, or both, pursuant to the provisions of the Federal Rules of Civil Procedure.

Plaintiffs are requested to bring with them all documents, agreements and receipts in support of their Complaint or upon which they will rely at the trial.

Joseph L. Rauh, Jr.

John Silard

Attorneys for Defendant

[Caption Omitted in Printing]

MOTION TO QUASH NOTICE OF DEPOSITION

Plaintiffs move the Court for an order quashing the notice of taking depositions and for reason therefor states: that the defendant failed to give the plaintiffs adequate notice of the taking of the deposition; and for the further reason that they requested plaintiffs to produce records without specifying which records are to be produced and without the filing of a motion to produce such records with adequate showing of good cause.

Arthur L. Willcher
Arthur L. Willcher
Atty for Plff
Indefinite Defs

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

NOTICE OF TAKING ORAL DEPOSITIONS

TO: Arthur L. Willcher, Esq.,
1026 Investment Building,
Washington, D. C.,
and
Frederick DeJoseph, Esq.,
4750 Wisconsin Avenue, N.W.,
Washington, D. C.,
Attorneys for Plaintiffs.

Please take notice that the defendant will take the depositions of the plaintiff, Maurice Lessin, and Robert D. Tedrow, Jr., an employee of the plaintiff, Sandoz, Inc., in the offices of Rauh and Silard, Suite 821, 1625 K Street, N.W., Washington, D. C., counsel for defendant, at 10:00 a.m. on Tuesday, April 28, 1964,

before Ward & Paul, shorthand reporters, or any other authorized Notary Public in and for the District of Columbia, said examination to be for the purpose of discovery or as evidence in this action, or both, pursuant to the provisions of the Federal Rules of Civil Procedure.

Plaintiffs are requested to bring with them for purposes of refreshing recollection all documents, agreements and receipts in support of their Complaint or upon which they will rely at the trial.

Joseph L. Rauh, Jr.

John Silard

1625 K Street, N.W.
Washington 6, D. C.

Attorneys for Defendant

[Caption Omitted in Printing]

MOTION FOR ISSUANCE OF SUBPOENAS FOR PRODUCTION OF DOCUMENTS ON DEPOSITION

Defendant moves the Court for an order directing the Clerk to issue subpoenas addressed to plaintiff Maurice Lessin, and to Robert D. Tedrow, Jr., an employee of plaintiff Sandoz, Inc., commanding them to produce at the taking of their depositions before Ward & Paul, Notaries Public, at the offices of counsel for defendant on December 1, 1964, the following documents:

1. The memorandum of conversation in the possession of plaintiff, Maurice Lessin, referred to by him at page 4 of his deposition on May 7, 1964.

2. All of the memoranda in the possession of Robert D. Tedrow, Jr., of conversations between the aforesaid Robert D. Tedrow, Jr., plaintiff Maurice Lessin, and defendant Evelyn G. Kaplan, referred to at pages 67 and 78 of the deposition of Robert D. Tedrow, Jr., on May 7, 1964.

In support of this motion, defendant asserts that this is an action for breach of contract in which the making of the contract alleged is denied by the defendant. In the depositions of the plaintiff, Maurice Lessin, and Robert D. Tedrow, Jr., an employee of the plaintiff, Sandoz, Inc., these witnesses testified to the existence of certain memoranda of conversations made by each of them and alleged to confirm the existence of the contract upon which this suit is based. The documents sought have been admitted by the aforesaid deponents in their depositions to be in their respective possessions. As they are directly relevant to the issues herein, defendant moves the Court for their production.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

NOTICE OF TAKING ORAL DEPOSITIONS

TO: Arthur L. Willcher, Esq.
1026 Investment Building,
Washington, D. C.,
and
Frederick DeJoseph, Esq.,
4750 Wisconsin Avenue, N.W.,
Washington, D. C.,
Attorneys for Plaintiffs.

Please take notice that the defendant will continue the taking of the depositions of the plaintiff, Maurice Lessin, and Robert D. Tedrow, Jr., an employee of the plaintiff, Sandoz, Inc., and will take the deposition of Mrs. Evelyn Nolan, an employee of the plaintiff, Sandoz, Inc., in the offices of Rauh and Silard, 1625 K Street, Northwest, Suite 821, Washington, D. C., counsel for defendant, at 10:00 a.m. on Tuesday, December 1, 1964, before Ward & Paul, shorthand reporters, or any other authorized Notary Public in and for the District of Columbia, said examination to be for the purpose of discovery or as evidence in this action, or both, pursuant to the provisions of the Federal Rules of Civil Procedure.

Joseph L. Rauh, Jr.

John Silard

1625 K Street, N.W.
Washington 6, D. C.

Attorneys for Defendant

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

ORDER

Upon consideration of the motion for issuance of subpoenas for production of documents on deposition filed herein October 21, 1964 it is this 6th day of November, 1964,

ORDERED that the motion be, and the same hereby is denied.

HARRY M. HULL, Clerk

Edward A. Tamm
Presiding Judge

By Estelle M. Hunter
Deputy Clerk

[Caption Omitted in Printing]

NOTATION OF DISMISSAL
(LOCAL RULE 13)

CAUSE

[redacted]

[redacted]

DISMISSED, without prejudice, pursuant to Local Rule 13, for failure to prosecute, as of 4-22-65.

HARRY M. HULL, CLERK

BY: Hazel A. Holtan
Deputy Clerk

[Caption Omitted in Printing]

MOTION TO VACATE ORDER OF DISMISSAL AND TO ENTER ACTION ON TRIAL CALENDAR

Plaintiffs moves the Court for an order vacating the dismissal of this action and for reason therefore states that the case was dismissed without their previous knowledge or information and after they had done everything they were required to do.

Plaintiffs assert that they announced ready for trial at the call of the calendar but the same was postponed at the request of the defendant for taking of depositions.

The case was not put on the trial calendar because of the action of the defendant and was dismissed without previous knowledge or notice to plaintiffs and the plaintiffs never received any notice or warning of dismissal. They are and have been ready to proceed with the trial as they feel that they have a meritorious cause of action as stated in the Complaint.

Plaintiffs allege that the action was dismissed without any wrong on their part and after compliance by them with the rules and regulations of the court.

Respectfully submitted.

Arthur L. Willcher,
Attorney for Plaintiffs
1511 K Street, N.W.
Washington, D.C.
296-7846

[Jurat Omitted in Printing]

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

OPPOSITION TO MOTION TO VACATE

ORDER OF DISMISSAL

Comes now defendant in opposition to the motion to vacate the order of dismissal entered in this case in April of 1965 and submits that said motion is without merit and should be denied.

Joseph L. Rauh, Jr.

John Silard

1001 Connecticut Avenue N.W.
Washington, D. C. 20036

Attorneys for Defendant

POINTS AND AUTHORITIES

Attached hereto are copies of the docket entries, the Notation of Dismissal and the First Notice under Local Rule 13. They show that on March 22, 1965 the Clerk mailed the First Notice under Rule 13 of this Court, and that on April 26 the Clerk entered the Notation of Dismissal, which was received in the mails by the undersigned in April of 1965. We are further advised by Deputy Clerk Bendeure that it is the uniform practice to mail such notices to all parties and that the designation on the April 26 entry "(N)" indicates mailing of the Notation of Dismissal to the parties (the "(AC/N)" reference is to notification to the Assignment Commissioner).

As specific grounds for denial of the motion to vacate defendant asserts that:

1. Plaintiffs do not clearly state that they received neither the First Notice under Rule 13, mailed on March 22, 1965, nor the Notice of Dismissal mailed on April 26, 1965. The presumption of regularity in the giving of notice, and the specific evidence thereof attached herewith, could not in any event be overcome by an unsworn claim that notice was not received.

2. Even if plaintiffs received neither the first notice nor the notation of dismissal, it was their obligation to keep current on the status of the case. Having defaulted on that obligation for some four years, during which defendant would otherwise have taken steps to preserve and prepare evidence, reinstatement of the action now would prejudice the defendant by virtue of plaintiffs' default.

3. This Court's Rule 13 having been complied with by due notice and entry of dismissal, no grounds or cause exists for vacating the order duly entered.

4. This Court's Rule 13(b) states that: "A failure of the Clerk to give the warning as above provided will not affect the running of the six months' period or otherwise relieve a party from operation of this rule."

WHEREFORE defendant respectfully submits that the motion to vacate should be denied.

[Subscription Omitted in Printing]

CIVIL DOCKET

United States District Court for the District of Columbia

13-63—6M—2464

PARTIES	ATTORNEYS	NUMBER
SANDOZ, INC., a corporation	Arthur L. Willcher 1026 Investment Bldg. Frederick DeJoseph 4750 Wisconsin Ave., N.W.	564-64
MAURICE LESSIN		ACTION FOR
v.		DAMAGES - BREACH OF CONTRACT
EVELYN G. KAPLAN	Joseph L. Rauh, Jr. John Silard 1625 K St NW	$15,000.00

FILED
APR 15 1969
ROBERT M. STEARNS, Clerk

TAXED COSTS

Atty.	
Marshal	
Clerk	
Witnesses	
Depositions	
Examiner	
Ct. Appeals	
TOTAL	

Jury demand [X]
Report Judgt. [ ]

DATE	ACCOUNT	REC'D	DISB'D
1964			
Mar. 6	Willcher	10 00	
Mar. 6	U. S. Treas.		10 00

DATE	ACCOUNT	REC'D	DISB'D

16

CIVIL DOCKET

United States District Court for the District of Columbia

		PROCEEDINGS
		Deposit for cost by
r.	6	Complaint, appearance, jury demand filed
r.	6	Summons copies (1) and copies (1) of Complaint issued Ser 3/19/64 (Real Est.Com)
	10	Answer of deft to complaint; c/m 4/8/64; appearance of Joseph L. Rauh, Jr. and John Silard. filed
	10	Calendared (AC/N) (N)
	10	Notice by deft to take deposition of Maurice Lessin and Robert D. Tedrow, Jr. filed
	14	Motion of pltf to quash notice to take deposition; c/m 4/13/64. MC 4/14/64. filed
	15	Notice by deft to take deposition of pltf and Robert D. Tedrow, Jr. filed
	27	Motion of pltffs. to quash taking of deposition withdrawn per atty. for pltffs. filed
	21	Depositions of Maurice Lessin and Robert D. Tedrow, Jr., 5/7/64. filed
	21	Motion of defendant for issuance of subpoena for production of documents on deposition. c/m 10-21-64 MC 10-21-64 filed
	21	Called Pretrial Examiner
	21	Notice by defendant to take oral depositions of plaintiff, Robert D. Tedrow, Jr. and Mrs. Evelyn Nolan, c/m 10-21-64. filed
	6	Order denying motion for order directing issuance of subpoenas. (N) Tamm, J.
	21	Deposition of Robert D. Tedrow, Jr. published. filed
	22	First notice under Rule 13
	26	Cause dismissed, as of 4-22-65. (AC/N) (N) (By Clerk)
	7	Motion of pltffs. to vacate order of dismissal and to enter action on trial calendar. c/m 4/7/69. M.C. filed

CLERK'S OFFICE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
U. S. COURTHOUSE
WASHINGTON, D. C.

OFFICIAL BUSINESS

POSTAGE AND FEES PAID
UNITED STATES COURTS

Mr. John Filard

Attorney at Law
1625 K Street N.W.

WASHINGTON, D. C.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

First notice under Rule 13 Mar 22, 1965

Stanley, Inc. et al

vs. } Civil No. 564-64

Evelyn F. Kaplan

You are hereby warned that it appears from the record that no action has been taken by you to prosecute your claim in this cause and that your claim will stand dismissed under the provisions of Rule 13 of this Court unless action be taken within the six months period provided.

HARRY M. HULL,
Clerk.

[Caption Omitted in Printing]

NOTATION OF DISMISSAL
(LOCAL RULE 13)

CAUSE

~~COUNTERCLAIM~~ _____

~~CROSS-CLAIM~~ _____

DISMISSED, without prejudice, pursuant to Local Rule 13, for failure to prosecute, as of 4-22-65.

HARRY M. HULL, CLERK

BY: Hazel A. Holtsclaw
Deputy Clerk

N A TRUE COPY
4-14-69
ROBERT M. STEARNS, Clerk,
By: Dorothy M. Evans
Deputy Clerk

[Caption Omitted in Printing]

AFFIDAVIT OF ARTHUR L. WILLCHER

District of Columbia, ss:

Arthur L. Willcher being on oath first duly sworn on oath according to law deposes and says he is the attorney for the plaintiffs herein. During this litigation he was engaged both as plaintiff and defendant with his former wife in domestic litigation in the Courts of the District of Columbia, Maryland and Virginia seeking a divorce and custody of his minor son.

A portion of this litigation is still persisting. As a result his almost total attention was directed to that personal litigation, and he assumed that the Sandoz case was at issue awaiting a trial date. The Court's attention is directed to L. P. Stewart v. Mathews 117 U. S. App. D.C. 279, 329 F 2nd 234, as additional authority in support of the motion to reinstate this action.

Arthur L. Willcher

[Jurat Omitted in Printing]

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Supplemental Memorandum for Defendant

Defendant submits these points and authorities, and her affidavit attached hereto, in further opposition to the pending motion by plaintiffs as amplified by the affidavit of their attorney Arthur L. Willcher, filed May 20, 1969.

1. In view of the time limit of Civil Rule 60(b)(1) no grounds are presented which would permit grant of the present motion under Rule 60(b)(6). Plaintiffs suggest that notwithstanding that Rule 60(b)(1) requires that motions based upon "mistake, inadvertence, surprise or excusable neglect" must be filed within one year, the decision in L. P. Steuart by our Court of Appeals would authorize the grant of their motion under Rule 60(b)(6) of the Federal Rules of Civil Procedure. But it is doubtful whether the Steuart decision is good law, and in any event the extraordinary circumstances there presented do not arise in the present case.

Steuart notwithstanding, it is an established principle that grounds encompassed in Rule 60(b)(1) cannot be presented beyond the one year limit of that rule merely by purporting to proceed under the "other reason" provision of Rule 60(b)(6). That was the thrust of the ruling by our Court of Appeals in Boehm v. Office of Alien Property, ___ App. D.C. ____, 344 F. 2d 195, where a motion on grounds of consent by mistake filed three years after dismissal was held barred by the one year limitation of Rule 60(b)(1), there being "no showing here of the extraordinary

circumstances required for relief under Rule 60(b)(6)". To the same effect is the recent ruling on this issue in Rinieri v. News Syndicate Co., 385 F. 2d 818, 822 (C.A. 2, 1967):

> ". . . Rule 60(b)(6) is not a carte blanche to cast adrift from fixed moorings and time limitations guided only by the necessarily variant consciences of different judges. It is not to be used as a substitute for appeal when appeal would have been proper, 7 Moore, Federal Practice ¶60.27(i) (2d ed. 1966), and may be relied upon only in 'exceptional circumstances'. Ackermann v. United States, 340 U.S. 193, 202, 71 S. Ct. 209, 94 L.Ed. 1371 (1950); Klapprott v. United States, 355 U.S. 601, 69 S.Ct. 384, 93 L.Ed. 2d 266 (1949). Thus, it is settled that 60(b)(1) and 60(b)(6) are not pari passu and are mutually exclusive, and that the latter section cannot be used to break out from the rigid time restriction of the former. Wright, Federal Courts § 98 (1963); 7 Moore, Federal Practice ¶60.27[1] (2d ed. 1966). While it is clear to us that Rinieri's showing would not have warranted relief under 60(b)(1), we need not labor the point for we are convinced that Rinieri has failed to bring himself within the 'extremely meagre' scope, as Judge L. Hand referred to it, of Rule 60(b)(6). United States v. Karahalias, 205 F. 2d 331, 333 (2d Cir. 1953)."

Moreover, the extraordinary circumstances which excused a delay of one year past the time limit of Rule 60(b)(1) in Steuart do not exist to excuse delay in the present case of three years past the prescribed period. In Steuart the personal problems of counsel arising from serious illness and death of his closest relatives were held not chargeable against the client; but here the extraordinary suggestion is made that a four year delay during which counsel never once examined into the status of the case is excusable because he was involved in family litigation involving divorce and custody. Much more compelling circumstances have been ruled inadequate to invoke Rule 60(b)(6) (see, e.g., Ackermann v. United States, 340 U.S. 193), and much shorter delays have been

held too long, even in the absence of notice to counsel, to permit reinstatement to the calendar (see, e. g., West v. Gilbert, 361 F. 2d 314).

2. Even if there were grounds for treating plaintiffs' neglect as excusable there has been prejudice to defendant which precludes such a result. If for the sake of argument we assume, notwithstanding the points above, that the plaintiffs' four year neglect to keep current with their case were somehow deemed excusable, it is clear that since the neglect was on the part of the plaintiffs it cannot be excused if there has been prejudice to defendant. As the attached affidavit indicates, there has been such prejudice in the specific sense that having no reason to preserve evidence during the last four years defendant has lost access to formerly available testimony and records. Indeed, the Court may presume prejudice from loss of recollection and evidence in view of the fact that plaintiffs are asking for reinstatement six years after the events complained of. In a suit based on a claimed oral contract, for whose vindication the applicable statute of limitations is three years (D.C. Code § 12-201), to require defendant to prepare and present parole evidence so long after the fact would violate the public policy clearly expressed by the limitations statute no less than by the one year bar of Rule 60(b)(1).

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

AFFIDAVIT OF EVELYN G. KAPLAN

City of Washington)
) SS:
District of Columbia)

Evelyn G. Kaplan, being duly sworn, deposes and says:

In connection with the plea of excusable neglect by plaintiffs in this case I wish to state respects in which I believe that I would be prejudiced by trial of this case in the event it is reinstituted four years after it was dismissed.

The relevant facts in this case relate to a claim by the plaintiffs that a verbal agreement was made between us in 1961 concerning my sale of the Highlands Apartments and my contention that there was no such agreement but that in 1963-1964 it was pursuant to an earlier agreement with the representative of the owner of the Highlands that I consummated the purchase thereof. In the years which have elapsed since these events, and particularly the four years since the case was dismissed, evidence which would have been available is no longer available, and reinstatement of the action now would prejudice my right to present my defenses. The loss of evidence relates to documents, witnesses that have become unavailable, and recollection which has necessarily faded after all these years.

As concerns documents and records, I made no effort to retain relevant documents bearing upon this case after it was dismissed in 1965. Indeed, when I discontinued my real estate brokerage business in 1966 and closed my office, many of my real estate

records were lost and/or destroyed beyond present possibility of recovery. Moreover, my former secretary-bookkeeper has had a stroke and I believe is totally unable to testify. Finally, upon dismissal of this case I took no steps to preserve the recollection of witnesses on my behalf, including attorney David Shapiro and Mr. Leo Zipkin, whose recollections now concerning conversations and authorizations in 1961 or 1962 would surely be impaired and far less credible if this case were reinstated.

Evelyn G. Kaplan
EVELYN G. KAPLAN

[Jurat Omitted in Printing]

[Caption Omitted in Printing]

ORDER

Upon consideration of the motion to vacate order of dismissal and to enter antion on trial calendar filed herein, April 7, 1969 it is this 29th day of May, 19 69,

ORDERED that the said motion be and the same hereby is denied.

ROBERT M. STEARNS, Clerk

By W. Quinn Dyer
Deputy Clerk

HOWARD F. CORCORAN

PRESIDING JUDGE

U. S. COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

SANDOZ, INC.
a corporation
1536 Connecticut Avenue, N.W.
Washington, D.C.

and

MAURICE LESSIN
8719 Colesville Road
Silver Spring, Maryland

Plaintiffs

vs.

EVELYN G. KAPLAN
10315 Kensington Parkway
Kensington, Maryland

Defendant

Civil Action No. 564-64

NOTICE OF APPEAL

The plaintiffs, Sandoz, Inc., and Maurice Lessin hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court dated May 29, 1969.

Arthur L. Willcher
Attorney for Plaintiffs
1511 K Street, N.W.
Washington, D.C.
296-7846

[Certificate of Service Omitted in Printing]

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,328

SANDOZ, INC.
and
MAURICE LESSIN,
Appellants

v.

EVELYN G. KAPLAN,
Appellee

Appeal From the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

ARTHUR L. WILLCHER
1511 K Street, N.W.
Washington D.C.
Attorney for Appellants

Washington, D.C. THIEL PRESS 202 393-0625

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TABLE OF CASES

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,328

SANDOZ, INC.
and
MAURICE LESSIN,
Appellants

v.

EVELYN G. KAPLAN,
Appellee

Appeal From the United States District Court
for the District of Columbia

BRIEF FOR APPELLANTS

QUESTIONS TO BE ANSWERED

1. Local Rule 13 provides for Dismissal of an Action if not prosecuted within 6 months. May the District Court refuse to exercise its discretion to vacate such dismissal when good cause is shown, because the rule operates automatically to dismiss the action? The answer should be "No."

2. Local Rule 13 requires the dismissal of an action if plaintiff fails to file a certificate of readiness even though plaintiff has in all

other respects prosecuted the action, but imposes no penalty on defendant for the same default. Is such a rule due process? The answer should be "No."

†††

This appeal has heretofore not been before the Court.

REFERENCE TO RULINGS

The ruling of the Court denying appellants' motion was predicated solely on the automatic operation of Local Rule 13. It was not reported as it took place in chambers.

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of the United States District Court for the District of Columbia in favor of appellee and against appellants. Appellants had moved the court to vacate the dismissal of the action below under the provisions of Federal Rule 60(b) which the Court summarily denied without considering the exercise of its judicial discretion. This Court has jurisdiction by virtue of Section 1291 of Title 28 of the United States Code.

STATEMENT OF THE CASE

Appellants brought an action against the appellee to recover a portion of a real estate brokerage fee which appellants claimed was owed to them by appellee. The appellee answered denying owing the debt.

Thereafter depositions of appellants and a witness were taken. The case was then called on the ready call and appellants announced ready for trial. The appellee objected to being placed on the ready calendar as she had further discovery to complete. The case was not calendared.

Thereafter the action was dismissed under local rule 13 for failure to calendar the action for trial. This dismissal was only be-

latedly discovered by appellants who then moved to vacate the dismissal alleging failure to receive notice of such dismissal, and counsel's personal occupation in certain domestic litigation which interfered with his attention to the pending litigation.

No prejudice has resulted to the appellee from the case not being tried.

SUMMARY OF ARGUMENT

On a motion to vacate a dismissal of an action it is the duty of the Court to exercise judicial discretion in the granting or denial of the motion; and not to assume that the court has no discretion to act.

A dismissal of an action for failure to have such action placed upon the ready calendar is not due process.

ARGUMENT

I

The object of all litigation is that actions be determined on its merits. Any action terminated for procedural reasons without a trial is violative of that principle.

In the instant case, the appellants were at all times ready for trial and so announced. The failure to file a Ready Certificate should not militate against them when no prejudice has been suffered by appellee.

Nevertheless, the Court refused to exercise any discretion announcing that Rule 13 operated automatically. Federal Rule 60 was designed to give the Court discretion and Rule 13 could not operate to defeat Rule 60 nor can the Court avoid the duty of exercising its discretion one way or the other. *L. P. Stewart, Inc. v. Mathews*, 320 F.2d 234, 117 U.S. App. D.C. 279.

In *Cornwell v. Cornwell*, 73 App. D.C. 279, the Court cited this language from *Langnes v. Green*, 282 U.S. 531, 51 S.Ct. 243, 75 L. Ed. 520:

> "The term discretion denotes the absence of a hard and fast rule . . . When invoked as a guide to judicial action, it means a sound discretion, that is to say a discretion exercised not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result."

In this case the Court exercised no discretion, but ruled that local rule 13 was binding and that he had no discretion. In doing so it committed error.

II

Rule 13 operates solely to the prejudice of the plaintiff in that if an action is not placed on the Ready Calendar, it is dismissed. No penalty attaches to a dilatory defendant. In order for the rule to attach no action need be instituted by the defendant to secure the dismissal of the action but the rule operates automatically. And the rule even operates without any showing of harm or prejudice to the defendant.

Can such a one sided, lop sided procedural rule be considered as "due process." If a ready certificate had been filed and the case remained on the calendar for the next four or five years, no harm would have befallen the appellants, and this situation does occur in the District Court. Why then this drastic result from the failure to file such a certificate. Why does not the rule provide that the burden is just as much on the defendant to file such a certificate before it could secure the dismissal of an action for failure of prosecution.

The time old expression is "even handed justice." The law is supposed to be impartial. It supposedly places similar burdens on the litigants. But in this instance the entire onus is placed upon the plaintiff with no corresponding obligation on the defendant, and without any showing of prejudice to the defendant. The entire pro-

cedure is contrary to the principle of justice that litigation is determined on the merits.

It is submitted that Rule 13 of the District Court is invalid.

CONCLUSION

It is respectfully submitted that the District Court committed error in dismissing this action, and in refusing to vacate the dismissal. Such judgment should be reversed.

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